IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 69

ROBERT A. BELL, JR.,

Petitioner,

VS.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE PETITIONER

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Opinion Below

The opinion of The Court of Criminal Appeals of Texas, which begins on page 38 of the Record, has been reported at 387 S.W.2d 411.

Jurisdiction

The judgment of The Court of Criminal Appeals of Texas was entered February 3, 1965, and rehearing denied on March 10, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

Question Presented

Whether in a trial for robbery the petitioner was denied a trial before an impartial jury and thereby deprived of his liberty without due process of law when the state informed the jury of the petitioner's prior criminal conviction, offered proof of such conviction and submitted a charge to the jury which required them to consider the allegation of the prior conviction and the evidence of such conviction at the same time they were considering the petitioner's guilt or innocence on the primary offense of robbery.

Constitutional and Statutory Provisions Involved

This case involves the following constitutional and statutory provisions:

The Fifth Amendment to the Constitution of the United States:

> "No persons shall be . . . deprived of life, liberty, or property without due process of law. . . ".

The Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ".

The Fourteenth Amendment to the Constitution of the United States:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; or shall any State deprive any person of life, liberty, or property without due process of law...".

Article 62, Vernon's Penal Code of the State of Texas:

"If it be shown on the trial of a felony less than capital that the defendant has been before convicted of the same offense, or one of the same nature, the punishment on such second or other subsequent conviction shall be the highest which is affixed to the commission of such offenses in ordinary cases."

Article 642 of the Texas Code of Criminal Procedure (repealed effective January 1, 1966):

"A jury being impaneled in any criminal action, the cause shall proceed in the following order:

1. The indictment or information shall be read to the jury by the attorney prosecuting.

• • • • •

4. The testimony on the part of the State shall be offered."

Statement

By indictment returned in the District Court of Upton County, Texas, the petitioner was charged with robbery. In the indictment it was alleged in full detail that the petitioner had been previously convicted of bank robbery in the United States District Court for the Victoria Division of the Southern District of Texas (R. 1-2).

On August 12, 1964 the petitioner was brought to trial before a jury. Prior to the reading of the indictment to the jury, petitioner's counsel moved to quash the indictment on the ground that the allegation of the prior offense was prejudicial and inflammatory and denied the petitioner a fair and impartial jury. It was specifically urged that the reading of the indictment amounted to a deprivation of due process in contravention of the Sixth, Fifth and Fourteenth Amendments to the Constitution of the United States (R. 4). This motion was overruled.

Following the reading of the indictment to the jury, the state offered documentary evidence of the petitioner's prior conviction. Counsel for petitioner renewed the objection to this evidence on the grounds previously stated in the motion to quash (R. 16). The objection was overruled and the documents detailing the alleged prior conviction were read to the jury and given to them as exhibits (R. 10-20).

The first witness for the state was a fingerprint expert from the Texas Department of Public Safety who testified that he had taken the fingerprints of the petitioner and that they were the same as the fingerprints shown on the prison record card (R. 21).

The remainder of the evidence introduced related to evidence on the offense alleged in the indictment and the petitioner's prior mental history. The petitioner did not take the stand. He did not offer character evidence.

The court's charge (R. 25) referred to the alleged prior conviction and in paragraph 12 (R. 29-31) required the jury to consider the alleged prior offense in conjunction with the offense of robbery for which the petitioner was on trial. Counsel for petitioner objected to the charge on the

grounds previously raised (R. 33). This objection was overruled (R. 33) and the charge read to the jury.

The defendant was found guilty, found to be the same person who had committed the prior offense (R. 34), and sentenced to life imprisonment (R. 35).

The question presented by this brief was presented to The Court of Criminal Appeals of Texas. That Court affirmed the conviction (R. 38).

Summary of Argument

In this appeal the validity of the state sentence is attacked under the Fifth, Sixth and Fourteenth Amendments on the ground that the impartiality of the jury was destroyed by the state's action in alleging and offering proof of the prior offense and by the charge which required the jury to consider the prior offense contemporaneously with the offense for which the defendant was on trial. We do not contend that recidivist legislation such as Article 62 of the Texas Penal Code is unconstitutional. We do contend that the procedure used in this case for the introduction of evidence of the prior offense is so likely to sway the jury as to amount to a denial of due process.

Argument

Petitioner asserts that he was denied a fair trial by the Texas procedure which informed the jury of the details of the prior conviction and required the submission of a charge that required the jury to consider the evidence of the prior conviction in conjunction with the evidence of the

offense with which he was charged and the evidence on petitioner's defense of insanity.

It is well established that evidence or allegations of a prior conviction are inadmissible to show that the defendant would be likely to commit the crime with which he is charged. *Michelson* v. *United States,* 335 U.S. 469, 475, 69 S. Ct. 213, 218 (1948). 1 *Wharton's Criminal Evidence,* Section 232 (12th ed. 1955). The probative value of evidence is deemed to be outweighed by its prejudicial effect.

This Court has consistently guarded the accused's right to be tried for the crime with which he is charged.

In *Boyd* v. *United States,* 142 U.S. 450, 12 S. Ct. 292 (1892) it was stated:

> . . . Proof of them (prior offenses) only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. Upon a careful scrutiny of the record we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged.

In *Marshall* v. *United States,* 360 U.S. 310, 79 S. Ct. 1171 (1959) the Court exercised its supervisory power in a fed-

eral criminal prosecution to overrule a conviction by a jury seven members of which had read a newspaper account of the petitioner's prior conviction. This action was taken notwithstanding the fact that the jurors who had read the article had been interrogated by the judge and had assured him that they could consider the case without prejudice toward the petitioner. In reversing the conviction, the Court states:

> . . . We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. Cf. Michelson v. United States, 335 U.S. 469, 475, 69 S.Ct. 213, 218, 93 L.Ed. 168. It may indeed be greater for it is then not tempered by protective procedures. 360 U.S. at 312, 79 S.Ct. 1173

The Courts of Appeals have also guarded defendants from this species of prejudicial evidence. In *United States* v. *Jacangelo,* 281 F. 2d 574 (3rd Cir. 1960) the court held that the reading of a co-defendant's confession containing references to the petitioner's prior conviction was prejudicial. The court states:

> . . . (T)he evidence of involvement in other crimes was intrinsically inadmissible as highly prejudicial information about a collateral matter not connected with the offense charged. (Citations omitted.) This was a far more serious matter than the technical objection to the statement as hearsay. To inform the jury of prior crimes of a defendant is, in the view of the Su-

preme Court, so improper and so prejudicial that a mistrial must be declared, even when the jurors assert that they can and will disregard that information.

> . . . (W)e think he should not have been subjected to additional risk of unwarranted harm through the pointless and wholly unnecessary disclosure of his prior complicity in crime. Therefore, scrupulous concern that criminal jury trials be safeguarded as far as possible against prejudicial influences dictates that the appellant be granted a new trial. 281 F.2d at 576-577.

In other contexts The Texas Court of Criminal Appeals recognizes the prejudicial effect of such testimony. In the recent case of *Seay* v. *State*, 395 S.W. 2d 40 (Tex. Crim. App. 1965) the prosecutor in oral argument responded to a defense argument that the defendant had never been convicted of a prior offense by "testifying" that the defendant had been convicted of swindling, theft and drunkenness. In reversing the case the court, speaking through presiding Judge McDonald, states:

> . . . So far as we can determine, the error brought forward in this case is one of first impression in this state. We entertain no doubt that the prosecutor was given far greater latitude in replying than he was entitled to do. If the state is precluded from establishing by evidence specific prior offenses committed by an appellant or charged against an appellant in a case of this kind, and we readily agree that the state is prohibited from so doing, how then can the state adduce such proof at the time of its argument to the jury, or argue such specific offenses or charges? The state

> cannot do so. We do not feel that such an extension of judicial authority is necessary to protect the rights of the state, nor would such an extension insure a fair and impartial trial to a defendant. The remarks made by the prosecutor or the facts testified to by the prosecutor in this case (it is difficult from the record to determine whether the prosecutor was a witness or an advocate) were improperly admitted. *Such remarks or evidence were no doubt highly inflammatory and prejudicial to appellant and stripped him of the fair and impartial trial that he was entitled to receive.* (Emphasis Added) 395 S.W. 2d 45

The standard against which the danger of prejudice in cases such as this is to be measured is summarized in *Estes* v. *State of Texas,* 381 U.S. 532, 85 S.Ct. 1628 (1965) as follows:

> . . . It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process. Such a case was In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), where Mr. Justice Black for the Court pointed up with his usual clarity and force:
>
> 'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* of unfairness. . .

> (T)o perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (99 L.Ed. 11).' At 136, 75 S.Ct. at 625. (Emphasis supplied.)

And, as Chief Justice Taft said in Tumey v. State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, almost 30 years before:

> 'the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a *possible* temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.' At 532, 47 S.Ct. at 444. (Emphasis supplied.)

This rule was followed in Rideau, supra, and in Turner v. State of Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed. 2d 424 (1965). In each of these cases the Court departed from the approach it charted in Stroble v. State of California, 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872, (1952), and in Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed. 2d 751 (1961), where we made a careful examination of the facts in order to determine whether prejudice resulted. In Rideau and Turner the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it. Likewise in Gideon

> v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and White v. State of Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963), we applied the same rule, although in different contexts. 381 U.S. at 542, 85 S.Ct. at 1632

The standard of these cases was again applied in the last term of this Court in *Sheppard* v. *Maxwell*, U.S., 86 S.Ct. 1507 (1966).

Thus, the question presented is whether prejudice probably resulted from submitting the questions of the prior offense to the jury at a time when it was considering the guilt or innocence of the petitioner.

In *Lane* v. *Warden, Maryland Penitentiary*, 320 F.2d 179 (4th Cir., 1963) the court made a full review of the state and federal authorities on the question, and held the procedure employed in that case, which was identical with the procedure used in the case at bar, to be a denial of due process.

The same result was reached in *United States* v. *Banmiller*, 310 F.2d 720 (3rd Cir., 1962). While that case limited its holding to capital cases in reliance upon the now discarded capital-non-capital dichotomy of *Betts* v. *Brady*, 316 U.S. 455, 462, 62 S.Ct. 1252 (1942), it is clear that the court regarded the procedure as being prejudicial. In discussing the instruction of the Court to the jury that they should disregard the allegations of the prior conviction in determining guilt or innocence on the primary offense the court states:

> . . . Certainly such a feat of psychological wizardry verges on the impossible even for berobed judges. It

> is not reasonable to suppose that it could have been accomplished by twelve laymen brought together as a jury. The admission of such evidence in Scoleri's trial must therefore be deemed to have been gravely prejudicial. We conclude that Scoleri's trial in this respect was so fundamentally unjust as to cause the trial court to lose jurisdiction. 310 F.2d 725

Those courts which have upheld procedures akin to that involved in this case have done so with scant discussion of the prejudicial effect of the introduction of the prior convictions. In *Wolfe* v. *Nash*, 313 F.2d 393 (8th Cir., 1963) the court chose to dismiss the argument as "unpersuasive" without citation of authority. In *Breen* v. *Beto*, 341 F.2d 96 (5th Cir., 1965), the Court dismissed with the statement that, "(W)e are of the firm view that the case was not well decided. . ."

The question is one of first impression in this Court.

Footnote 8 in *Michelson* v. *United States*, 335 U.S. 469, 475, 69 S.Ct. 213, 218 (1948) has been advanced by the state in its reply to the petition for certiorari in this case as approval of the procedure here involved. The footnote is to the following statement:

> The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.[8]

The relevant portion of the footnote states:

> [8] This would be subject to some qualification, as when a prior offense is an element of the latter offense; for example at a trial for being an habitual criminal.

This language is directed to admissibility *per se*, not to the question of the stage of the proceeding at which such evidence is to be admitted. Certainly evidence of a prior offense would be admissible at a separate hearing for the purpose of determining whether or not the defendant was an habitual criminal. Such a procedure was approved on *Oyler* v. *Boles*, 368 U.S. 488, 82 S.Ct. 501 (1962). Footnote 8 to *Michelson* is not a holding on the question raised by the case at bar.

There is language in *Graham* v. *West Virginia*, 224 U.S. 616, 32 S.Ct. 583 (1912) which might be cited as approval of the procedure here in question. West Virginia had a procedure which permitted the state to charge a defendant as being a multiple offender after a finding of guilt on the second or subsequent offense. The petitioner, who had pled guilty to a second offense at a time when there was no indication that the state would seek an enhanced penalty, contended that if the state wished to inflict a greater penalty upon him as a multiple offender it should be required to give notice of its intent to seek the greater penalty prior to a trial on the merits for the second offense. In the course of the opinion it is stated:

> . . . Although the state may properly provide for the allegation of the former conviction in the indictment, for a finding by the jury on this point in connection with its verdict as to guilt, and thereupon for the imposition of the full sentence prescribed, there is no constitutional mandate which requires the state to adopt this course even where the former conviction is known. It may be convenient practice, but it is not obligatory. 32 S.Ct. 588

The contention of the petitioner must be kept in mind in reading this statement. The petitioner was contending that the state had to inform him of its intent to enhance the penalty. The court is simply stating that while such notice may be given it does not have to be given. As will be discussed below there are alternative procedures by means of which the prior conviction can be alleged in the same indictment as the primary charge and the two issues tried in separate hearings before the same jury. The Court in this case did not have before it the question of whether a procedure such as that involved in the case at bar would deny the defendant a fair trial. Its statement should be read in context and applied in conjunction with the alternative procedures which it cites with approval.

The Texas Court of Criminal Appeals has not denied the prejudicial effect of evidence of prior convictions. In *Oler* v. *State,* 378 S.W. 2d 857 (Tex. Crim. App., 1964) the Court cites *Lane* as being persuasive but declines to follow it on the ground that the court did not have "rule making" powers.

The prejudicial effect of such evidence was recognized by the Texas Court in the cases of *Pitcock* v. *State,* 367 S.W. 2d 865 (Tex. Crim. App., 1963) *Ex parte Reyes,* 383 S.W.2d 804 (Tex. Crim. App., 1964) *McDonald* v. *State,* 385 S.W.2d 253 (Tex. Crim. App., 1964) and *Salinas* v. *State,* 365 S.W. 2d 362 (Tex. Crim. App., 1963) which hold that it is error for the state to read the allegations of the prior offense to the jury if the defendant stipulates that he was convicted of the prior offenses. In *Pitcock* it is stated that the allegations of the prior offenses are to be omitted in order to avoid possible prejudice to the accused. If such information is prejudicial to the defendant who stipulates

it is prejudicial to the defendant who does not stipulate. The Constitutional guarantee of a fair trial is a right to be enjoyed by all, not a privilege to be purchased at the price of stipulations to the state's case.

The prejudice engendered by the procedure involved in this case is aggravated by the fact that it is unnecessary. Protective procedures have been in use for at least 130 years. In *Graham* v. *West Virginia*, 224 U.S. 616, 32 S.Ct. 583 (1912) the Court gives the following description of an 1836 English statute:

> . . . It was established by statute in England that, although the fact was alleged in the indictment, the evidence of the former conviction should not be given to the jury until they had found their verdict on the charge of crime. The act of 6 & 7 Wm. IV. chap. 111, provided that it should "not be lawful on the trial of any person for any such subsequent felony to charge the jury to inquire concerning such previous conviction until after they shall have inquired concerning such subsequent felony, and shall have found such person guilty of the same; and whenever in any indictment such previous conviction shall be stated, the reading of such statement to the jury as part of the indictment shall be deferred until after such finding, as aforesaid." Exception was made in cases where the accused gave evidence of good character to meet the charge of crime, whereupon the prosecutor might show the former conviction before the verdict of guilty had been returned. And in Reg. v. Shuttleworth, 3 Car. & K. 375, 376, Lord Campbell thus stated the practice under the statute: "It is the opinion of all the judges: The prisoner is to be arraigned on the whole indict-

> ment, and the jury are to have the new charge only stated to them; and if no evidence is given as to character, nothing is to be read to the jury of the previous conviction till the jury have given a verdict as to the new charge. The jury, without being resworn, are then to have the previous conviction stated to them; and the certificate of it is to be put in, and the prisoner's identity proved." See 24 & 25 Vict. chap. 96, Section 116. 32 S.Ct. 586

The procedure advocated by the English authorities was adopted by Connecticut in *State* v. *Ferrone*, 96 Conn. 160, 113 Atl. 452 (1921). The reasoning behind this change is forcefully stated as follows:

> . . . It cannot be believed that an accused man would ever have a fair trial, resulting in a verdict not affected by prejudice or by considerations by which the jury should not be influenced, if during that trial allegations that he has twice before been convicted of state prison crimes have been read to the jury, and evidence of his former convictions has been placed before them. It is beyond question that knowledge of such facts must necessarily prejudice the minds of his triers against the accused, and cause him more serious injury than that which he would suffer from any improper remarks of the state's attorney. No one would claim that in a trial for a specific crime evidence of another crime committed by the accused could be admitted for the purpose of proving his guilt of the crime alleged . . . A man is not to be convicted of one crime by proof that he is guilty of another. Therefore our law sedulously guards against the introduction of evidence of any matter immaterial or irrelevant to the single issue

to be determined. The purpose of these salutary laws might often be defeated if the minds of the jurors were subjected to the influence of facts or considerations having no legitimate bearing on the only question they have to decide, and their verdict be reached under the impulse of passion, sympathy, or resentment. Such a verdict is illegal and will be set aside. (Citations) The rule everywhere enforced excludes not only evidence of another crime, but also evidence tending to degrade the accused, to prejudice the jury against him, to divert their minds from the real issue which they have to determine, or to persuade them by matters which they have no legal right to consider that the accused, for reasons other than those based upon legitimate evidence, was more likely to have committed the particular crime for which he is on trial. . . . (s)uch an information as this presents two separate issues, and the issue of former convictions does not relate to the issue of the commission of the specific crime alleged, and for which only the accused is to be tried, and the fact of former convictions does not tend in any way to prove the commission of the crime charged. It follows that, until the verdict of the jury on the principal issue has been rendered, no knowledge of the alleged previous conviction should reach them, either by reading that part of the information in which they are recited or by evidence relating to them. If the verdict on the principal issue be guilty, then the second issue may be submitted to the jury. (113 Atl. at 457)

With its revised Code of Criminal Procedure, Texas has joined those states which provide a fair procedure in cases such as this. Article 36.01 of the Texas Code of Criminal Procedure provides:

. . . A jury being impaneled in any criminal action, the cause shall proceed in the following order:

1. The indictment or information shall be read to the jury by the attorney prosecuting. When prior convictions are alleged for purposes of enhancement only and are not jurisdictional, that portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment is held as provided in Article 37.07.

Article 37.07 is a general statute providing for the presentation of evidence regarding the accused's record at a post-conviction hearing. Thus the Texas practice is now the same as the English procedure discussed in *Graham* and adopted by the Connecticut court in *State* v. *Ferrone*. The defendant is given notice of the state's intent to proceed under the recidivist statute but the jury is in no way informed of the alleged prior offense unless and until it finds him guilty of the offense for which he is on trial.

We do not overlook the paragraph 13 of the charge (R. 31) which instructs the jury as follows:

. . . You are further charged that even though you may find and believe from the evidence beyond a reasonable doubt that the defendant committed and was convicted of the offense charged in the second paragraph of the indictment herein, yet, you are instructed that you cannot consider such commission, if any, or conviction, if any, or any evidence relating thereto, if any, in passing upon the issue of the guilty, if any, or the innocence, if any, of the defendant for the offense set out in the first paragraph of the indictment herein.

This is but one of those futile rituals described by Judge Frank in *Skidmore* v. *Baltimore & O. R. Co.*, 167 F.2d 54, 61 (2d Cir., 1948) (footnote 15d). To consider it, or any other instruction, a procedural safeguard in this context would be but an indulgence of an assumption of the character dismissed by Justice Jackson in his frequently quoted concurring opinion in *Krulewitch* v. *United States*, 336 U.S. 440, 453, 69 S.Ct. 716, 723 (1949).

As noted by Chief Judge Biggs in *United States* v. *Banmiller*, 310 F.2d 720 (3rd Cir., 1962) in the passage quoted above, instructions such as this call for dimensions of dispassion found in few of us.

In this case the state has used a procedure which unnecessarily injects prejudicial statements at every phase of the trial. In *Turner* v. *Louisiana*, 379 U.S. 466, 85 S.Ct. 546 (1965) this Court struck down the practice of permitting deputy sheriffs to double as witnesses and jury shepherds for the reason that there was the danger of probable prejudice to the accused. Surely the danger of prejudice in that case is less than presented by the case at bar.

Conclusion

For the reasons stated it is respectfully submitted that the judgment in this case should be reversed and the case remanded to The Court of Criminal Appeals of Texas for further proceedings not inconsistent with the decision of this Court.

Respectfully submitted,

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